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Supreme Court, U.S.
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No. 08-440

IN THE

Supreme Court of the United States

ELEANOR BODKIN, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

BRIEF FOR JOHN HAVELOCK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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3 November 2008

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and STATEMENT OF CONSENT[1]

John E. Havelock, an Alaskan attorney in good standing, previously admitted to this court, moves for leave to file the attached brief *amicus curiae* that is set out below. This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court.

Counsel for petitioner has consented to the filing of this brief and his consent letter will be lodged with the Clerk of the Court. Counsel for the respondent was notified pursuant to Rule 37.2(a) of the intent of the amicus to file an *amicus curiae* brief, and respondent withholds such consent. Therefore, the *amicus* moves, pursuant to Rule 37.2(b) for leave to file this *amicus curiae* brief.

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

QUESTIONS PRESENTED

1. Does a distribution of assets to a special class of shareholders in Cook Inlet Region, Inc, (CIRI), an Alaska Corporation established pursuant to the Alaska Native Claims Settlement Act (ANCSA), which class is not based on need and is limited to shareholders who held shares on December 17, 1971 and are now at least 65 years of age, qualify as a distribution "to promote their health, education or welfare" within the meaning of 43 U.S.C. §1606(r) when other shareholders whose needs for health, education or welfare benefits are either identical or far greater are excluded from the class?

2. Is there any requirement that a distribution of assets authorized only by 43 U.S.C. §1606(r) be distributed to a class defined with a rational relationship to the goal specified in the statute: to promote the health, education or welfare of the Corporation's shareholders "who are Natives or descendents of Natives or to its shareholders' immediate family members who are Natives or descendents of Natives?"

3. Is there any limit to the power given to ANCSA Corporation directors by 43 U.S.C. §1606(r) to distribute the corporation's wealth among shareholders of the board's choosing?

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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* arises from his experience as an attorney who, as Attorney General of Alaska, represented the State of Alaska at the time the Alaska Native Claims Settlement Act was negotiated and adopted, and who since then has represented at least five village corporations, and many Alaska Natives individually, and who is familiar with the Settlement Act, its purposes and its administration.

Amicus is concerned, as an officer of the court and citizen of Alaska, for the welfare of all Alaska Natives, and that the administration of the Alaska Native Claims Settlement Act be fair and just and that the purposes of the Act not be distorted or lost in contention and bitterness over unfair distributions of assets that were originally the property of all the Alaska Native people, this distribution by CIRI setting an example that will likely be followed by other ANCSA corporations to the detriment of the Alaska Native people generally.

SUMMARY OF ARGUMENT

CIRI's board of directors have voted to distribute a handsome, irrevocable life pension to shareholders who (like the members of the board) are shareholders who happened to be alive and at least twenty-seven years old at the time ANCSA was adopted. This is a large class, large enough to assure that a majority of board members can be reelected by a grateful shareholder-electorate.

There is no evidence that the members of this class are more in need of health, education or welfare benefits than other shareholders. Intuition tells us that for most of the shareholders who will receive this benefit, the days of education are behind them. While those over 65 surely are more likely, in a rough calculus, to have health problems, it is far from clear that, between Medicare and the Indian Health Service, this preferred class has a greater need for money than shareholders who are under this age, still caring for children, if they are not children themselves, and beset by any of the myriad of medical and economic problems that plague disadvantaged minorities, which Alaska's Natives still surely are. To effect Congressional intent, "welfare" should be tied to an eleemosynary standard.

ARGUMENT

The adoption of 43 U.S.C. §1606(r) was intended to allow a Native Corporation more room to act, in part, as a social agency and not just as a business corporation. Most of the larger ANCSA corporations, including all the regional corporations, have already addressed this type of demand on their resources by establishing independent non-profit corporations[2] that provide special grants for medical, social and educational purposes. Just as most large profit-making corporations in America set aside sums for eleemosynary purposes, partly buying community goodwill, partly as a social duty, so did the larger ANCSA corporations including CIRI. CIRI in particular is involved in a major Alaska Native Health project, collaborating with other regional corporations.

Although many Alaska Natives have thought the best way to distribute wealth for social purposes was in modest amounts through not-for-profit organizations, others, such as some directors of CIRI, have believed

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[2] The sympathy of the Congress and the Alaskan people for the view that ANCSA was intended to serve broad social purposes is reflected in the provisions of the act that allowed Alaska Natives to organize as not-for-profit corporations. This being too restrictive an option, no Village or regional corporation organized as a not-for-profit corporation, though the feeling that there were broader obligations than profit making for shareholders persisted.

that the corporation should directly engage in eleemosynary activities but on a massive scale, in the case before the court, putting a class of shareholders in the position of preferred shareholders.

A onetime distribution from a sponsored not-for-profit corporation for transportation for a school sports team, or to get a deserving youth off to an out-of-state college or to assist some person with a special medical problem does not get much attention, falling into the same category as community goodwill. The selection of beneficiaries is not a matter of great moment because there is usually a screening committee and the amounts involved are not large.

The CIRI distribution at stake in this application is such a distortion of eleemosynary purpose that it is not entitled to be called eleemosynary. It amounts to a distribution to an old boy network within the shareholder group consisting of those who were at least twenty-seven years old at the time of the enactment of ANCSA.

The right to take a distribution does not relate to the number of shares owned. A shareholder who gave his stock to his children (for, among other reasons, to take the income out of his income tax) gets the same distributional benefit as the shareholder who held on to his stock. An elder, now deceased, who got shares in 1971 and left the shares to an older child who is now or will become sixty-five is not eligible through his estate. The number of eligible shareholders is such that the money put in the trust for these

purposes will run out. So the distribution goes only to the more current shareholders.

The distribution bears no fairly describable relation to the health, education or welfare of CIRI shareholders except as any handout benefits the recipient of that handout.

This distributional program is being watched by the whole Native community. If it is allowed to be legal, then it will be copied by other Native Corporations. As the law now stands, there appears to be no limitations on the scope of distributions. The temptation to help one's friends is considerable.

The basic problem is that this arrangement is beyond what the Congress intended. ANCSA §1606(r) was intended at most to be a narrow exception to the general arrangement of a Settlement of Land Claims set out in ANCSA. This general arrangement established a system of for-profit corporations that were to provide benefits to Alaska Natives through their participation in the corporate structure and dividend according to a long established, American, institutionalized system. The amendment was not intended to wreck this system, but to modify it to allow for distributions "to promote the health, education, or welfare of such shareholders or family members..." Some meaning must be given to the legislative language "health, education or welfare" to save the Settlement Act from becoming a pot of money and resources subject to raiding by a majority

of a board of directors for the special benefit of friends (and themselves).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED

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November 3, 2008